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Re: ***State of Delaware v. Luis A. DeJesus, Sr.***
Case No.: 0510020501

Date Submitted: May 24, 2006
Date Decided: June 2, 2006

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Wednesday, May 24, 2006 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's Final Decision and Order.

(I) THE FACTS

Luis A. Dejesus, Sr. (the "defendant") was charged with one unclassified misdemeanor, a violation of 11 *Del. C.* §601(a)(1) filed by Information by the Attorney General filed with the Criminal Clerk of the Court. The charging documents allege that "on or about the 25th day of October, 2005, in the County of New Castle, State of Delaware, [DeJesus] did intentionally touch Kevin Turner 'either with a member of his body, or a with any instrument, knowing that he is likely to cause offense or alarm to that person'". *Id.*

At trial, the Attorney General produced as a fact witness, Kevin Turner ("Turner") the complainant. Turner works as a part-time employee as a process server for an independent

contractor hired by Family Court to serve summonses and other papers. Turner has also been employed as a City of Wilmington Fire Fighter for the past seventeen (17) years. On the date charged in the Information on October 25, 2005, Turner went to the defendant's residence to serve papers and/or summons on behalf of the Family Court. These documents were marked as State's Exhibit No. 1 and moved into evidence without objection by the defendant. Turner picked up the paperwork at his place of employment in order to serve the defendant while "on his way to work." He subsequently appeared at 403 South Bridge Street, defendant's residence, in the City of Wilmington. He knocked on the screen door and informed the defendant, "I have additional paperwork for you."

According to Turner, the defendant then became "very upset" and used expletives and ordered Turner to remove himself forthwith from defendant's porch and/or property.

Turner advised that the defendant he had to leave certain process papers for him on behalf of the Family Court. The defendant again used expletives and ordered Turner off of the "f---ing" property. After Turner had served the process papers on the defendant, Turner turned to walk down the porch stairs at defendant's residence. He was suddenly hit with the folded copy of the court documents on the right side of his face. The four (4) page document was folded in half and was therefore 8 pages in thickness. State's Exhibit No. 2 was moved into evidence and which were pictures showing Turner's temple with an abrasion above his eyes. According to Turner, the defendant was approximately 6 feet away when he folded the paper and threw it and struck Turner at the top of his face. Tuner testified at trial that he was "shocked" by the defendant's actions.

According to Turner, he has never been struck or had papers thrown at him or treated in the manner the defendant treated him on this day during his five years of employment as a process server for the Family Court.

On cross-examination, Turner indicated he was on his way to his City of Wilmington job as a fire fighter and was not "double-dipping".

A copy of the document marked as Defense Exhibit No.1 was entered into evidence with no objection by the State. This document was the actual summons directed to the defendant. The summons had noted on it "alt. address 403 South Broom Street, Wilmington, Delaware 19805." The actual person or designee on the Motion Affidavit to Modify Custody summons was Luis A. DeJesus, Sr. c/o David Gagne, 3200 Concord Pike, Wilmington, DE 19803, DeJesus' counsel of record. When questioned by the defense, Turner testified that he did not know why there was no return of service in the Family Court file. Turner testified it was "probably misfiled". Turner also did not have a reason why David Gagne was not served with the papers or summons. Turner testified he was instructed to have the papers delivered by summons directly with to the defendant at his address of record.

The defense presented its case-in-chief. Robert E. Taylor ("Taylor") was sworn and testified. He currently has high blood pressure and kidney disease but appeared on behalf of the defendant. Taylor in part, observed the alleged altercation between the defendant and Turner and saw the defendant on the steps. He saw the paper "fly down the steps towards Turner". Taylor could not hear the verbal exchange between the defendant and the Turner but believed it was "funny". He testified he had a clear view of the incident but could not state with any certainty what was actually being exchanged verbally between the parties.

(II) THE LAW

The State has a burden of proving each and every element of the offense beyond a reasonable doubt. 11 *Del. C.* §301; *State v. Matushefske*, Del. Supr., 215 A.2d 443 (1965). As established case law indicates "[A] reasonable doubt is not a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial men may honestly entertain after a conscious consideration of the evidence or want of evidence in the case." *Matushefske*, 215 A.2d 445. A reasonable doubt "means a substantial, well-founded doubt rising from a candid and impartial consideration of all the evidence or want of evidence." *State v. Wright*, Del. Gen. Sess., 79 A.2d 399 (1911). The State also has the burden of beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* §232, See *James v. State*, Del. Supr., 377 A.2d 15 (1977); *Thorton v. State*, Del. Supr., 405 A.2d 126 (1979).

(III) DISCUSSION

In determining whether the State has met its burden of proving each and every element of defense beyond a reasonable doubt, the Court may consider all direct and circumstantial evidence.

Delaware defines offensive touching as follows:

> A person is guilty of offensive touching when he intentionally touches another person, either with a member of his body or with any instrument, knowing that he is thereby likely to cause offense or alarm to such person.

The question whether a person knows that he is likely to cause or offense or alarm entails a view of all the circumstances, including the victim's state of mind[1]. However, the ultimate conclusion as to the "character" of the "touching act" may be reached without considering the

[1] Defendant did not raise at trial the affirmative defense of self defense, 11 *Del.C.* §464(a).

quality of the victim's responsive act or acts. *Blachowicz v. Pennington*, 1987 Del. Ch. LEXIS 401 (July 17, 1987); *See also, State v. Roger J. Ferguson*, 2003 CCP Lexis 14, Welch, J. (February 28, 2003); *State v. Tammy N. Brown*, 1999 Del. C.P. Lexis 42, Welch, J. (May 12, 1999): [defines predicate elements of offensive touching].

As stated in *Saeed Hassan v. State of Delaware*, 1999 Del. Super Lexis 544, Herlihy (December 8, 1999:

* * *

> "The statute requires, in order for a conviction, for the State to prove the essential elements involved in offensive touching there must be an 'intentional touching'.
>
> The only requirement further for a conviction of offensive touching is that it caused the recipient, in this case [the victim], offense or alarm at the touching. No physical injury is required whatsoever.

* * *

> There are three elements to the crime of offensive touching: (1) an intentional touching of another; (2) with a member of one's body or any instrument and (3) knowing that such intentional touching is likely to create offense or alarm to another person. It is the knowing element which the trial judge did not expressly address or find.
>
> "Knowing" is a concept defined by the Criminal Code under "knowingly" as follows:
>
> A person acts knowingly with respect to an element of an offense when:
>
> (1) If the element involves the nature of the person's conduct or the attendant circumstances, the person is aware that the conduct is of that nature or that such circumstances exist; and
> (2) If the element involves a result of the person's conduct, the person is aware that it is practically certain that the conduct will cause that result.
>
> The finding, therefore, that a defendant knew his intentional touching of another was likely to cause offense or alarm is a

> necessary predicate to a conviction of offensive touching. Lacking that express finding in this case, unlike the express finding of the other two elements of this offense, constitutes error. It is error, as noted, reviewable on *certiorari.*"

See Blachowicz v. Pennington, 1987 Del. Ch. LEXIS 401, Del. Super., C.A. No. 85C-MY-125, O'Hara, J. (February 17, 1987).

See: Saeed Hassan v. State of Delaware, supra.

The word intentionally is defined in the Delaware Code 11 *Del. C.* §231(a) as:

> A person acts 'intentionally' with respect to an element of an offense when:
> (1) If the element involves the nature of the person's conduct or as a result thereof, it is the person's conscious object engaging conduct of that nature or to cause that result and;
> (2) If the element involves the intended circumstances, the person is aware of the existence of such circumstances or believes or hopes they exist.

The word "knowingly" is defined in 11 *Del. C.* §231(b) as follows:

> (b) "*Knowingly"* A person acts knowingly with respect to an element of an offense when:
>
> (1) If the element involves the nature of the person's conduct or the attendant circumstances, the person is aware that the conduct is of that nature or that such circumstances exist; and
> (2) If the element involves a result of the person's conduct, the person is aware that it is practically certain that the conduct will cause that result.

The Court notes as a trier of fact it is the sole judge of the credibility of each fact witness. If the Court finds the evidence to be presented in conflict, as in the instant record, it is the Court's duty to reconcile these conflicts, if reasonably possible to make one harmonious story. If the Court cannot do this, the Court must give credit to the portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony in which in the Court's judgment is unworthy of credit. In performing this task, the Court takes into consideration the demeanor of each fact witness, the apparent fairness in giving their testimony,

the opportunities in hearing and knowing the facts about which each fact witness testified, and any bias or interest each fact witness may have concerning the case.

(IV) OPINION AND ORDER

From a review of all the facts, testimony and documentary evidence introduced into the record, the Court finds the State has proven the alleged violation of offensive touching, 11 *Del. C.* §601, beyond a reasonable doubt. 11 *Del.C.* §301. *State v. Matushefske*, Del. Supr., 215 A.2d 443 (1965). Clearly the defendant touched the victim, Turner, with an instrument, namely a folded piece of paper and struck him in the upper face portion of his above his eye. The Court also finds the defendant did so "intentionally" as defined above. Clearly a review of the law set forth above and specifically, in 11 *Del.C.* §231(a), the Court concludes beyond a reasonable doubt that the defendant, by throwing the subject court documents and/or summons folded over and striking the defendant in the face "had a conscious object or was to engage in conduct" that constituted striking the victim Turner in the face with the instrument he actually threw at Turner. The Court also specifically finds the folded piece of paper, or summons constituted an "instrument" pursuant to 11 *Del. C.* §601.

The Court also finds based upon this trial record that the defendant knew that he "was likely to cause such offensive alarm" to Turner. 11 *Del. C.* §601. At trial Turner testified that he was "shocked" when the papers struck him above the eye as shown in State's Exhibit No. 2. The picture with a small injury above his eye. After a series of expletives directed at Turner, the defendant threw the "instrument" and struck Turner in the face. The State has also satisfied jurisdictional venue requirements. 11 *Del. C.* §232. *Thorton v. State*, Del. Supr., 405 A.2d 126 (1979); *James v. State*, Del. Supr., 377 A.2d 15 (1977).

The Court understands the defendant's ex-wife and/or spouse has filed in excess of 200 filings with the Family Court. However, Turner bears no direct or indirect responsibility for these court filings.

Based upon the totality of the circumstances, a review of the evidence in the trial record, the credibility of all fact witnesses and the inferences contained therein, the Court adjudicates the defendant **GUILTY** as charged.

The Criminal Clerk shall schedule the sentencing of this matter at the earliest convenience of the Court and counsel.

IT IS SO ORDERED this 2nd day of June, 2006.

John K. Welch
Judge

/jb

cc: Theresa Bleakly, Scheduling Supervisor
CCP, Criminal Division